

## **Rethinking Constitutional Limitations on Punitive Damages: Providing Economically Efficient Incentives to Prevent Nursing Home Abuse**

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# RETHINKING CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES: PROVIDING ECONOMICALLY EFFICIENT INCENTIVES TO PREVENT NURSING HOME ABUSE

## INTRODUCTION

Arturo Martinez “was ‘just playing with her.’”<sup>1</sup> Arturo had been arrested four times when he was hired to serve the elderly at a nursing home in the Queens borough of New York City.<sup>2</sup> The sixty-nine-year-old woman that Arturo was “playing with” was a resident at the nursing home who suffered from dementia.<sup>3</sup> Arturo had his “right hand ‘in motion inside the patient’s diaper,’” according to the nurse’s aide who witnessed the sexual abuse of the resident.<sup>4</sup> The Supreme Court was likely not thinking of elder abuse victims when it decided that punitive damages should generally be less than ten times the amount of compensatory damages.<sup>5</sup>

Elder abuse can take the form of neglect as well. Mary Fitzpatrick’s mother had been living for two days in Belmont Health Care Center, in Nashville, Tennessee when Mary first came to visit her.<sup>6</sup> On that first visit, Mary found her mother sitting “in her own wastes in a wheelchair.”<sup>7</sup> Each afternoon, Mary would arrive at the nursing home and clean her mother’s waste, bathe her, and change her sheets.<sup>8</sup> After about six weeks, Mary’s mother started showing signs of bedsores.<sup>9</sup> Eventually, the situation became so serious that Mary’s mother could

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1. Jennifer Marciano, Comment, *Mandatory Criminal Background Checks of Those Caring for Elders: Preventing and Eliminating Abuse in Nursing Homes*, 9 ELDER L.J. 203, 212 (2001) (citing Joe Calderone & Thomas Zambito, *Dangerous Caregivers*, N.Y. DAILY NEWS, Dec. 17, 2000, at 7).

2. *Id.*

3. *Id.*

4. *Id.*

5. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

6. Susan J. Hemp, Note, *The Right to a Remedy: When Should an Abused Nursing Home Resident Sue?*, 2 ELDER L.J. 195, 196 (1994) (citing *Medicaid Issues in Family Welfare and Nursing Home Reform: Hearings on H.R. 2270 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 100th Cong. 186–87, 189, 191 (1987) (statement of Mary Fitzpatrick)).

7. *Id.*

8. *Id.*

9. *Id.*

not rest without experiencing pain from her bedsores.<sup>10</sup> Near the end of Mary's mother's life, her legs became black and blue below the knee.<sup>11</sup> By the time the state inspected the facility to address the problem, Mary's mother's funeral was underway.<sup>12</sup> The Supreme Court was probably not thinking of Mary Fitzpatrick's mother when it decided that the Due Process Clause of the Fourteenth Amendment places substantive limits on punitive damages.<sup>13</sup>

Elder abuse and neglect are exacerbated by underfunded, understaffed nursing homes, whose liability insurance premiums are extremely costly because of exorbitant legal judgments.<sup>14</sup> For example, a jury awarded over \$94 million in punitive damages to Reba Gregory for injuries resulting from a nurse's aide's negligence.<sup>15</sup> At sixty-six-years-old, Reba was already partially paralyzed when a nurse's aide dropped her, fracturing her hip and shoulder.<sup>16</sup> Reba had to undergo hip replacement surgery.<sup>17</sup> Her attorney argued that the facility was "chronically understaffed" and that two people, not one, should have been assisting Reba.<sup>18</sup> The jury awarded Reba "\$365,580.71 in compensatory damages, and \$94,720,450 in punitive damages,"<sup>19</sup> enough money to provide beds for over 1900 nursing home residents for one year.<sup>20</sup> Based on this example, one can envision a vicious cycle—a nursing home is subject to a large punitive damages judgment that depletes resources, making the facility underfunded, understaffed and

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10. *Id.*

11. *Id.*

12. Hemp, *supra* note 6, at 196 n.4.

13. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

14. See Terrance J. Shanahan, Comment, *Statutory Limits on Punitive Damages in Nursing Home Negligence Actions: Preventing the Collapse of the Private Nursing Home*, 4 J. HEALTH CARE L. & POL'Y 373 (2001). Shanahan argues that plaintiffs' lawyers, not the elderly, benefit from punitive damages awards. *Id.* at 385. According to Shanahan, nursing homes spend large amounts of money defending claims, only to pay multi-million dollar judgments, which cost more money to appeal. *Id.* at 392. Such costs make it difficult for the nursing home to serve its residents. *Id.*

15. *Reductions: Verdicts Reduced After Trial*, NAT'L L.J., Feb. 22, 1999, at C16.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Conservatorship of Gregory v. Beverly Enters.*, 95 Cal. Rptr. 2d 336, 338 (Ct. App. 2000). The award was remitted on defendant's motion to \$124,480.57 in compensatory damages, and \$3 million in punitive damages, and the plaintiff was awarded attorneys' fees. *Id.*

20. *Beverly Enterprises, Inc. 2003 Annual Report, Consolidated Statement of Operations*, <http://www.beverlycorp.com/NR/rdonlyres/B7B0E4E7-2AD3-443B-AEA7-515FFE4C6EA4/0/a2003SECform10KAetc.pdf> (last visited Feb. 14, 2005). These figures are based on the total costs and expenses for Beverly in 2002, divided by the total number of available beds for that year. *Id.* Each bed costs Beverly \$48,710 per year. *Id.*

unable to provide adequate care, which in turn creates an environment for abuse or neglect, subjecting the facility to more liability.<sup>21</sup>

The tension between the rights of elderly nursing home residents and the nursing home's ability to operate profitably has engendered much debate.<sup>22</sup> Part II of this Comment provides background information on the elderly population.<sup>23</sup> Next, Part II also discusses the current law limiting punitive damages under the Due Process Clause of the Fourteenth Amendment.<sup>24</sup> Part III exposes many of the weaknesses in the Supreme Court's analysis of punitive damages awards and argues for an approach that considers economic efficiency.<sup>25</sup> Part IV argues that limiting punitive damages based on a maximum ratio between compensatory damages and punitive damages will most adversely impact nursing home abuse and neglect cases.<sup>26</sup> Therefore, Part IV also proposes a framework for applying punitive damages to nursing home abuse cases.<sup>27</sup> Part V concludes that economically efficient punitive damages, in which total damages are compensatory damages multiplied by the inverse of the enforcement rate, will help alleviate nursing home abuse and neglect.<sup>28</sup> Creating an economic incentive for nursing homes to self-regulate and prevent abuse will be beneficial for the growing elderly population and allow nursing homes to operate profitably.<sup>29</sup>

## II. BACKGROUND: ELDER ABUSE, NURSING HOMES, AND CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES

Cases of nursing home abuse often result in punitive damages awards,<sup>30</sup> making limitations on punitive damages particularly important in the context of nursing home abuse. This section provides Cen-

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21. Marc Barnes, *Insurance Hikes Threaten Nursing Homes*, THE BUS. J. (Triad), Feb. 15, 2002, <http://www.bizjournals.com/triad/stories/2002/02/18/story1.html>. According to Gerald Cox, president of a privately held corporation that runs a chain of twenty-four nursing homes, a large adverse financial impact on long-term care facilities "ultimately affects quality of care." *Id.* Thus, a large punitive damages award assessed against a nursing home, which increases the facility's insurance premium, will affect the quality that nursing home residents receive and likely lead to more abuse and neglect.

22. See Shanahan, *supra* note 14; Ellen J. Scott, Comment, *Punitive Damages in Lawsuits Against Nursing Homes*, 23 J. LEGAL MED. 115, 119 (2002).

23. See *infra* notes 32–63 and accompanying text.

24. See *infra* notes 64–125 and accompanying text.

25. See *infra* notes 126–178 and accompanying text.

26. See *infra* notes 179–190 and accompanying text.

27. See *infra* notes 191–219 and accompanying text.

28. See *infra* notes 220–236 and accompanying text.

29. See *infra* notes 228–236 and accompanying text.

30. Patricia Sievers Harris, *Defense Perspective Litigating Nursing Home Cases*, ARK. LAW., Summer 2001, at 15.

sus 2000 data on the growing elderly population and statistics on the prevalence of elder abuse. This section also discusses the financial status of the nursing home industry. Lastly, this section explores the Supreme Court cases that have limited punitive damages. These cases are particularly significant for nursing home abuse victims because punitive damages often represent the bulk of damages in nursing home abuse cases.<sup>31</sup>

### A. *Data on the Growing Elderly Population*

According to Census 2000 data, by 2011, there will be a 15.3 percent increase in the number of elderly living in the United States.<sup>32</sup> By 2030, the elderly population will likely grow to 71.45 million, which is more than twice the number of elderly counted in the 2000 census.<sup>33</sup> By 2050, the elderly population will likely reach 86.7 million and comprise approximately twenty percent of the U.S. population.<sup>34</sup> These statistics lead to one inexorable question: How will society care for all of these elderly people?

### B. *The Financial Viability of the Modern Nursing Home*

The answer, at least in many cases, is that the growing elderly population will be placed in nursing homes. Although only twenty-one percent of people age eighty-five and over currently reside in nursing homes, that number will probably increase due to societal demographic shifts.<sup>35</sup> Specifically, in today's society, families are smaller, divorce is more prevalent, and more people are entering the workforce, all of which contributes to a decrease in the amount of adult children available to care for elder relatives.<sup>36</sup> Therefore, an overview of the nursing home industry is crucial to any analysis of the "crisis in long-term care."<sup>37</sup> In 1999, there were approximately 1.63

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31. See *infra* notes 180–190 and accompanying text.

32. U.S. Census Bureau, Projections of the Total Resident Population by 5-year Age Groups, and Sex with Special Age Categories: Middle Series, 2011 to 2015 (Jan. 13, 2000), <http://www.census.gov/population/projections/nation/summary/np-t3-d.pdf>. The estimated population of people sixty-five and over in 2011 is 40,358,000. *Id.* at 1. The sixty-five and over group consisted of approximately 35,061,000 in 2000. U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin, Table 2a: Projected Population of the United States, by Age and Sex: 2000 to 2050 (Mar. 18, 2004), <http://www.census.gov/ipc/www/usinterimproj/natprojtab02a.pdf> [hereinafter Table 2a].

33. Table 2a, *supra* note 32, at 1.

34. *Id.* The total population in 2050 is projected to be 419,854,000. *Id.*

35. ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 11 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

36. *Id.*

37. See Shanahan, *supra* note 14, at 373.

million people residing in nursing homes, 1.47 million of which were over the age of sixty-five.<sup>38</sup> Of these residents, 757,100 were over the age of eighty-five.<sup>39</sup> In 1999, nearly 1.2 million nursing home residents were on Medicare or Medicaid.<sup>40</sup> Approximately 500,000 of the residents were male and 1.17 million of the residents were female.<sup>41</sup> In 1999, there were approximately "18,000 nursing homes operating in the United States."<sup>42</sup>

While the increase in medical malpractice premiums is well documented, the nursing home industry faces a similar problem.<sup>43</sup> Recent studies show that nursing homes are sued at a rate of 14.5 lawsuits for every 1,000 beds, which is double the rate from just five years ago.<sup>44</sup> Since 1997, the average claim paid has risen by twenty-eight percent, from \$156,000 to \$200,000.<sup>45</sup> The increase in lawsuits, liability, and damages has caused nursing home liability insurance premiums to increase by about 400 percent since 1998, to \$80,000 per facility.<sup>46</sup> Due to these increases, many nursing homes have sold facilities. For example, Mariner Health Care Inc. recently sold nineteen of its twenty-seven Florida nursing homes, citing "exposure to liability-insurance costs and litigation risks" and an overabundance of debt.<sup>47</sup> In recent years, three other national nursing home chains sold some or all of their Florida property because of the rising cost of liability insurance.<sup>48</sup> In 2000, Integrated Health Services filed for Chapter 11 bankruptcy.<sup>49</sup> Nursing homes in Texas and Pennsylvania are experiencing similar problems.<sup>50</sup> Insurance premiums for some "Pennsylvania

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38. NAT'L CTR. FOR HEALTH STATISTICS, DEP'T OF HEALTH AND HUMAN SERVS., THE NATIONAL NURSING HOME SURVEY: 1999 SUMMARY 21 tbl. 16 (June 2002), [http://www.cdc.gov/nchs/data/series/sr\\_13/sr13\\_152.pdf](http://www.cdc.gov/nchs/data/series/sr_13/sr13_152.pdf).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2. There was an average of 105 beds per facility with an eighty-seven percent occupancy rate. *Id.*

43. See Joseph Bednar, *On the Defensive*, BUSINESS WEST, Oct. 1, 2003, at 60; Karen Ignagni, *Moving Beyond the Blame Game*, FRONTIERS OF HEALTH SERVICES MANAGEMENT, Oct. 1, 2003, at 3.

44. Bednar, *supra* note 43, at 60.

45. *Id.*

46. See *Massachusetts: Legal Claims Against Nursing Homes Are; [sic] Increasing*, AM. HEALTH LINE, Sept. 3, 2003 at 13, LEXIS, News & Business, News, By Individual Publication.

47. Greg Groeller, *Mariner Sells Off Nursing Homes: A Joint Venture Bought the 19 Facilities, Including Five in Central Florida*, ORLANDO SENTINEL, Oct. 28, 2003, at C1.

48. *Id.* Beverly, Genesis Health Ventures, and Integrated Health Services have all sold some, if not all, of their Florida nursing homes because of the liability insurance crisis. *Id.*

49. Rashda Khan, *Nursing Facility Scheduled to Close*, PATRIOT-NEWS, Sept. 11, 2003, at B1.

50. Shanahan, *supra* note 14, at 384.

nursing homes have increased [by] as much as [300 percent].”<sup>51</sup> Not only are nursing homes paying higher premiums and moving out of high-risk states, but some insurers are dropping long-term coverage entirely. From 1997 to 2000, twenty-three of seventy-nine insurers surveyed by the Florida Department of Insurance stopped covering long-term care facilities entirely.<sup>52</sup> In addition, because many nursing homes are reimbursed on fixed rates from Medicare or Medicaid, it is difficult to raise revenues to cover the increasing cost of running a long-term care facility.<sup>53</sup>

### C. *Statistics on Elder Abuse and Neglect*

The prevalence of elder abuse in America is difficult to assess. Some estimates suggest that approximately 450,000 elderly are abused each year in domestic settings alone.<sup>54</sup> Some studies estimate that as many as 2.5 million elders are abused each year.<sup>55</sup> Statistics also suggest that elder abuse is reported far less often than child abuse; whereas one out of every three cases of child abuse is reported, a mere one out of eight cases of elder abuse is reported.<sup>56</sup> Offenders are difficult to find and punish because elders are often afraid of retaliation and believe that reporting will not improve their situation.<sup>57</sup>

A study by the United States General Accounting Office (GAO), released in March 2002, investigated physical and sexual elder abuse in three states from July 2000 to February 2002.<sup>58</sup> The report detailed the lack of enforcement in nursing home abuse in two of those states, Georgia and Illinois, and made recommendations for improved en-

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51. *Id.* This data is from the year 2000. *Id.*

52. *Id.* at 383 (citing *Long-Term-Care Liability Market Continues to Shrink*, BEST'S INS. NEWS, Sept. 25, 2000).

53. Barnes, *supra* note 21.

54. NAT'L CTR. ON ELDER ABUSE, AM. PUB. HUMAN SERV. ASS'N, THE NATIONAL ELDER ABUSE INCIDENCE STUDY 1 (Sept. 1998), [http://www.aoa.dhhs.gov/eldfam/elder\\_rights/elder\\_abuse/ABuseReport\\_Full.pdf](http://www.aoa.dhhs.gov/eldfam/elder_rights/elder_abuse/ABuseReport_Full.pdf).

55. ELDER ABUSE: INTERNATIONAL AND CROSS-CULTURAL PERSPECTIVES 1 (Jordan I. Kosberg & Juanita L. Garcia eds., 1995). Other commentators have suggested that the upper limit may be closer to 1.5 million elders per year. PATRICIA J. BROWNELL, FAMILY CRIMES AGAINST THE ELDERLY: ELDER ABUSE AND THE CRIMINAL JUSTICE SYSTEM 3 (1998).

56. BROWNELL, *supra* note 55, at 3.

57. *Elder Abuse in Residential Long-Term Care Facilities: Testimony Before the U.S. Senate Comm. on Finance*, 107th Cong. 4 (2002) (testimony of Catherine Hawes), available at <http://finance.senate.gov/hearings/testimony/061802chtest.pdf>.

58. U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE (GAO-02-312, Mar. 2002), <http://www.gao.gov/new.items/d02312.pdf>. The survey looked only at physical and sexual abuse in nursing homes, without considering cases of neglect. *Id.* at 3. The three states surveyed were Illinois, Pennsylvania, and Georgia. *Id.*

forcement.<sup>59</sup> Of the 102 cases of alleged abuse in Illinois and Georgia, only sixty-four were reported to the Medicaid Fraud Control Unit (MFCU), which is responsible for investigating and prosecuting patient abuse and neglect.<sup>60</sup> Those reports to the MFCU resulted in just twenty-one convictions.<sup>61</sup> The state agencies that reported the complaints to the MFCU also screened them before making a referral, based on “the severity of the allegations or circumstances.”<sup>62</sup> In addition, the state agencies considered the likelihood of a criminal conviction in deciding whether to report the cases to the MFCU.<sup>63</sup> These statistics reflect two related problems: (1) elder abuse is all too common; and (2) society has done a poor job detecting elder abuse and punishing those who harm the elderly. In the coming years, these problems will be magnified by the growing elderly population.

#### D. Elder Abuse and Neglect Cases

The following cases of elder abuse and neglect are illustrative of the elder abuse epidemic. These cases represent a sampling of the problem. In addition, they demonstrate the important role of punitive damages in jury awards from elder abuse and neglect cases.

A jury awarded a \$312.71 million verdict in *Fuqua v. Horizon/CMS Healthcare Corp.*, before the parties reached a \$20 million post-verdict settlement.<sup>64</sup> There, the deceased resident had been admitted to the defendant’s nursing home after a stroke.<sup>65</sup> The resident also suffered from anemia, dementia, and urinary tract infections.<sup>66</sup> The plaintiff alleged that the nursing home did not meet the resident’s needs because they failed to feed her, reposition her in bed, or provide range-of-motion exercises.<sup>67</sup> The resident’s condition worsened, creating stage III and stage IV pressure sores, “where the skin has rotted away,

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59. *Id.*

60. *Id.* at 15; OFFICE OF INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., STATE MEDICAID FRAUD CONTROL UNITS: ANNUAL REPORT (2003), <http://oig.hhs.gov/publications/docs/mfcu/MCFU2003.pdf>.

61. U.S. GEN. ACCOUNTING OFFICE, *supra* note 58, at 16. It is important to note that the results in Georgia dramatically differed from the results in Illinois. *Id.* Georgia only referred fourteen of fifty-two cases to the Medicaid Fraud Control Unit (MFCU), but Illinois referred all fifty of its cases. *Id.* The number of convictions in Illinois was eighteen, whereas only three convictions resulted from the referrals in Georgia. *Id.*

62. *Id.* at 15.

63. *Id.*

64. *Mock Trials, Major Verdict: Attorneys Prep for Nursing Home Case with Warm-Up Trials, Win \$312 Million*, THE NAT’L L.J., Feb. 4, 2002, at C17 [hereinafter *Mock Trials*].

65. *Id.*

66. *Id.*

67. *Id.*



exposing ligaments, joints and bone.”<sup>68</sup> Two months after leaving the nursing home, the resident died and her son sued the home’s owner, alleging “negligence, gross negligence, malice, fraud, and felony violations of the Texas penal code.”<sup>69</sup> As a discovery sanction, the court held the defendant liable and the plaintiff only had to prove damages.<sup>70</sup> The plaintiff argued that the nursing home was deliberately understaffed.<sup>71</sup> The plaintiff also introduced “internal memos and the company manual, pointing out that there would be no Medicaid reimbursement for Stage I pressure sores, but that there would be reimbursement for sores at worse stages.”<sup>72</sup> The plaintiff alleged that the defendant had a financial incentive to allow a pressure sore to develop to stage III or IV.<sup>73</sup> After the jury awarded \$310 million in punitive damages and \$2.71 million in compensatory damages, the parties settled for \$20 million.<sup>74</sup>

In *Rodebush v. Oklahoma Nursing Homes, Ltd.*,<sup>75</sup> a nurse’s aide at the defendant nursing home slapped the plaintiff in the face.<sup>76</sup> The nursing home had hired the nurse’s aide without checking his criminal history, in violation of the nursing home’s policy.<sup>77</sup> The nurse’s aide had previously been convicted of “assault and battery with intent to kill,” and “escape and carrying a weapon after” a felony conviction.<sup>78</sup> The jury found for the plaintiff and awarded \$50,000 in actual damages and \$1.2 million in punitive damages.<sup>79</sup>

*Advocat, Inc. v. Sauer*<sup>80</sup> involved a ninety-three-year-old nursing home resident who died from “severe electrolyte abnormalities, with contributing factors” including malnutrition and Alzheimer’s type dementia.<sup>81</sup> When the resident died, she

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68. *Id.*

69. *Id.*

70. See *Fuqua v. Horizon/CMS Healthcare Corp.*, 199 F.R.D. 200 (N.D. Tex. 2000). Horizon had “consistently attempted to thwart the Plaintiffs’ efforts to obtain discovery at almost every turn,” by repeatedly waiting until the last possible moment to respond to discovery requests. *Id.* at 204.

71. *Mock Trials*, *supra* note 64.

72. *Id.*

73. *Id.*

74. *Id.*

75. 867 P.2d 1241 (Okla. 1993).

76. *Id.* at 1243–44.

77. *Id.* at 1244.

78. *Id.*

79. *Id.* at 1244–45. The nursing home resident sued for negligent hiring and supervision, “intentional infliction of physical injury and emotional distress.” *Id.* at 1244. His wife also sued for intentional infliction of emotional distress, but the intentional infliction of emotional distress claim was dismissed as to the wife. *Rodebush*, 867 P.2d at 1244.

80. 111 S.W.3d 346 (Ark. 2003).

81. *Id.* at 350.

had lost fifteen pounds in the last month and was in need of a feeding tube. There were signs of bedsores . . . stemming from lying in urine and excrement. She suffered from contractures from Alzheimer's disease, which involved contraction of her limbs into her sockets. She also had a urinary infection and had been experiencing a foul vaginal discharge.<sup>82</sup>

There was also evidence that the defendants knew the nursing home was short-staffed, "but took no measures to rectify the situation."<sup>83</sup> The resident's estate sued several defendants and the jury returned a verdict for the estate in the amount of \$15.4 million in compensatory damages, \$63 million in punitive damages, and \$25,000 for breach of contract.<sup>84</sup> The Supreme Court of Arkansas affirmed the judgment, but remitted both the compensatory and punitive damages, slashing them by two-thirds.<sup>85</sup>

These cases demonstrate that jury awards in elder abuse and neglect cases often consist of a large amount of punitive damages. Many of the largest verdicts are not reported in written opinions, and therefore, it is difficult to ascertain what part of the verdict constitutes compensatory damages and what portion represents punitive damages. For example, In *Estate of Burton v. Texas Health Enterprises, Inc.*, a \$28.26 million verdict was entered in favor of the seventy-eight-year-old resident, who died after receiving four surgeries "as a result of feeding tube complications."<sup>86</sup> One of the largest jury awards against a nursing home in U.S. history was awarded in *Rhodes v. HEB Nursing Home*, where the nursing home allegedly neglected a resident.<sup>87</sup> The resident was "paralyzed on one side and, thus, experienced difficulty feeding himself."<sup>88</sup> The resident's condition deteriorated because the nursing home staff did not inquire as to why the patient was

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82. *Id.*

83. *Id.* at 358.

84. *Id.* at 351. The complaint alleged "negligence, negligence *per se*, tort of outrage, breach of contract and wrongful death." *Id.* The negligence *per se* count was later dropped and replaced with a medical malpractice count. *Advocat*, 111 S.W.3d at 351.

85. *Id.* at 369. Although the court thought it appropriate to impose punitive damages, the court held that both the compensatory and punitive damages awards shocked the court's conscience, requiring a reduction in the amount awarded. *Id.* at 356, 359. Thus, compensatory damages were reduced to \$5 million and punitive damages were reduced to \$21 million. *Id.* at 369.

86. Julie A. Braun & Elizabeth A. Capezuti, *A Medico-Legal Evaluation of Dehydration and Malnutrition Among Nursing Home Residents*, 8 ELDER L.J. 239, 262 (2000) (citing No. 95-00828, 1998 WL 8916040 (Harris County Ct. Apr. 1998)).

87. *Id.* at 271 (citing \$250 Million Nursing Home Verdict Largest in U.S. History, QUALITY CARE ADVOC., Feb.-Mar. 1999, at 5).

88. *Id.*

not eating.<sup>89</sup> The jury returned a verdict for the plaintiff of \$250 million.<sup>90</sup>

*E. The Supreme Court Addresses the Constitutionality of Punitive Damages Awards*

In the early 1990s, the U.S. Supreme Court took a process-based approach in examining several cases that presented questions about the constitutionality of punitive damages awards. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>91</sup> the plaintiff sued an insurance company for fraud.<sup>92</sup> The jury awarded the plaintiff over \$1 million, which included a punitive damages award of "more than [four] times the amount of compensatory damages."<sup>93</sup> The Supreme Court held that the award did not violate due process, reasoning that Alabama's judicial review ensured "that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."<sup>94</sup> The Court recognized that a ratio of more than four-to-one between compensatory and punitive damages "may be close to the line" of constitutionality.<sup>95</sup> But the Court found that the award consisted of objective criteria and emphasized that there is no mathematical formula for computing punitive damages.<sup>96</sup> The Court adhered to the process-based approach in upholding a punitive damages award in *TXO Production Corp. v. Alliance Resources Corp.*<sup>97</sup> In affirming the judgment, the Court reasoned that if a judgment is a product of fair procedures, then the "product of that process is entitled to a strong presumption of validity."<sup>98</sup>

The Court also has addressed whether a state could properly prohibit judicial review of a jury's punitive damages award. In *Honda Motor Co., Ltd. v. Oberg*,<sup>99</sup> the issue was whether an Oregon Constitutional amendment prohibiting judicial review of a jury's punitive damages award violated the Due Process Clause.<sup>100</sup> Oregon prohibited judicial review of a jury's award "unless the court [could] affirma-

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89. *Id.*

90. *Id.*

91. 499 U.S. 1 (1991).

92. *Id.* at 5-6.

93. *Id.* at 23.

94. *Id.* at 22.

95. *Id.* at 23.

96. *Id.* at 18.

97. 509 U.S. 443 (1993).

98. *Id.* at 457.

99. 512 U.S. 415 (1994).

100. *Id.* at 418.

tively say there is no evidence to support the verdict.”<sup>101</sup> The Court held that Oregon could not place the issue of punitive damages within the “unreviewable discretion of the jury.”<sup>102</sup> In so holding, the Court looked to history and the common law, rejecting Oregon’s argument that sufficient procedural safeguards, such as evidentiary rules, jury instructions, and appellate review, ensured that the punitive damages were not arbitrarily awarded.<sup>103</sup>

### F. *The Court Shifts to a Substance-Based Approach*

In the mid-1990s, the Court shifted its inquiry into deciding whether a particular award was unconstitutionally excessive. The Court first struck down a punitive damages award as a violation of substantive due process in *BMW of North America, Inc. v. Gore*.<sup>104</sup> The *Gore* analysis shifted the Court’s approach to punitive damages, by applying a three-prong approach to determine if the punitive damages award was unconstitutionally excessive.<sup>105</sup> This analysis was reaffirmed in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>106</sup> where the Court again struck down a punitive damages award as unconstitutionally excessive.<sup>107</sup> The Court shifted to a three-part analysis that

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101. *Id.*

102. *Id.* at 435.

103. *Id.* at 421–32. The Court reasoned that punitive damages awards have been subject to judicial review “for as long as punitive damages have been awarded.” *Id.* at 421, 430–36. The Court traced the roots of judicial review of punitive damages back to an English case from 1763. *Oberg*, 512 U.S. at 421. In addition, the Court found a “dramatic difference” between the scope of Oregon’s judicial review and that imposed by the common law. *Id.* at 426. Also, Oregon claimed that four safeguards limited the chances of arbitrary awards: “[T]he limitation of punitive damages to the amount specified in the complaint, the clear and convincing standard of proof, preverdict determination of maximum allowable punitive damages, and detailed jury instructions.” *Id.* at 432. The Court rejected Oregon’s argument that those safeguards adequately prevented arbitrary awards. *Id.*

104. 517 U.S. 559 (1996). In *Gore*, the plaintiff sued BMW for common law fraud because BMW failed to disclose the fact that the plaintiff’s vehicle had been repainted before he bought it. *Id.* at 563. At trial, BMW acknowledged a nationwide policy whereby repairs that cost less than three percent of the suggested retail price were not disclosed to the dealer. *Id.* at 563–64. The plaintiff also introduced evidence to show that “BMW had sold 983 refinished cars as new,” in various states, “without disclosing that the cars had been repainted before sale.” *Id.* at 564. The jury returned a verdict for the plaintiff of \$4,000 in compensatory damages and \$4 million in punitive damages, which the Supreme Court of Alabama reduced to \$2 million. *Id.* at 564. In holding the punitive damages award unconstitutional, the Supreme Court recognized that a punitive damages award will violate due process when the award is “grossly excessive in relation to” the state’s legitimate interests in punishing and deterring unlawful conduct. *Id.* at 568.

105. *Gore*, 517 U.S. at 574–75.

106. 538 U.S. 408 (2003).

107. *Id.* at 408. In *Campbell*, the plaintiff sued State Farm Insurance for refusing to settle a tort action on the plaintiff’s behalf. *Id.* at 413. Although investigators and witnesses agreed that the plaintiff was at fault for the car accident, State Farm nonetheless refused to settle for the policy limit and contested liability at trial. *Id.* The plaintiff alleged that State Farm’s refusal to

balanced the following factors to determine if a punitive damages award was excessive: (1) "the degree of reprehensibility of the defendant's conduct";<sup>108</sup> (2) the ratio between actual and punitive damages;<sup>109</sup> and (3) the potential "civil or criminal penalties that could be imposed for comparable misconduct."<sup>110</sup>

Under the reprehensibility prong, the Court's approach recognized that "nonviolent crimes are less serious than" violent crimes.<sup>111</sup> Also, intentional conduct, such as "trickery and deceit" was more reprehensible than accidental conduct.<sup>112</sup>

Under the "ratio" prong, the Court suggested in *Gore* that the relevant ratio between compensatory damages and punitive damages was "not more than ten to one."<sup>113</sup> In *Campbell*, the Court revised its analysis, noting that "single-digit multipliers are more likely to comport with due process," suggesting that the relevant ratio is now less than ten to one.<sup>114</sup> But the Court was hesitant to apply mathematical formulas and emphasized that a higher ratio may be appropriate where "a particularly egregious act has resulted in only a small amount of economic damages" or when the "injury is hard to detect or the monetary value of noneconomic harm" is difficult to determine.<sup>115</sup> In *Campbell*, the Court expressed the converse view, that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."<sup>116</sup>

Under the third prong, the Court looked to the disparity between the award and similar civil sanctions for comparable misconduct.<sup>117</sup> In

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settle gave rise to a tort action for "bad faith, fraud and intentional infliction of emotional distress." *Id.* at 414. The plaintiffs introduced evidence that State Farm's refusal to settle the Campbells' previous lawsuit was part of a national scheme to cap payouts on claims. *Id.* at 415. This so-called scheme, referred to as the "'Performance, Planning and Review,' or PP & R policy," concerned "State Farm's business practices for over twenty years in numerous states," but most of those practices were unrelated to the type of claim made by the plaintiffs. *Campbell*, 538 U.S. at 415. The jury awarded the plaintiffs "\$2.6 million in compensatory damages and \$145 million in punitive damages." *Id.*

108. *Gore*, 517 U.S. at 574 n.21. See *Campbell*, 538 U.S. at 418.

109. *Gore*, 517 U.S. at 580. See *Campbell*, 538 U.S. at 423.

110. *Gore*, 517 U.S. at 583. See *Campbell*, 538 U.S. at 428.

111. *Gore*, 517 U.S. at 576 (quoting *Solem v. Helm*, 463 U.S. 277 (1983)) (internal quotation marks omitted).

112. *Id.* (quoting *TXO*, 509 U.S. at 462) (internal quotation marks omitted). See *Campbell*, 538 U.S. at 419.

113. *Gore*, 517 U.S. at 581. Under the *TXO* analysis, compensatory damages can include not only the actual harm, but also the harm that is likely to result from the defendant's conduct. *Id.*

114. *Campbell*, 538 U.S. at 425.

115. *Gore*, 517 U.S. at 582. See *Campbell*, 538 U.S. at 425.

116. *Campbell*, 538 U.S. at 425.

117. *Gore*, 517 U.S. at 583-84. See *Campbell*, 538 U.S. at 428.

both *Gore* and *Campbell*, the Court gave little emphasis to the third prong, as the punitive damages award in both cases was substantially greater than other potential sanctions.<sup>118</sup>

### 1. Other Important Factors Addressed by the Court

The Court has made other important points about due process constraints on punitive damages as well. In *Gore*, one of the proposed justifications for the punitive damages award was that BMW had implemented a nationwide policy requiring the nondisclosure of important facts that could diminish the value of the cars it sold.<sup>119</sup> The Court stressed that a state has no power to punish behavior “that was lawful where it occurred and that had no impact on” the state where the case was tried.<sup>120</sup> The Court has also made clear in both cases that the defendant’s status as a wealthy, large corporation “cannot justify an otherwise unconstitutional punitive damages award.”<sup>121</sup>

### 2. The Court Rejects Economic Efficiency

In both *Gore* and *Campbell*, the Court was confronted with the argument that punitive damages should reflect notions of economic efficiency. In *Gore*, a group of law and economics scholars filed an amicus brief in support of the plaintiff, arguing that judicial review of punitive damages awards should include a consideration of the probability that the defendant will not be caught and punished for similar tortious acts.<sup>122</sup> In its *Gore* opinion, the Court did not address the economic efficiency argument.

In *Campbell*, an economic efficiency argument was made in the plaintiff’s brief, where the plaintiff argued that an award of over \$200 million would be justified on deterrence grounds based on principles of economic efficiency.<sup>123</sup> In upholding the punitive damages award, the Utah Supreme Court justified the award partly because there was evidence that State Farm was punished in only “one out of every

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118. “[T]he \$2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.” *Gore*, 517 U.S. at 584.

119. *Id.* at 563.

120. *Id.* at 573. See *Campbell*, 538 U.S. at 421.

121. *Campbell*, 538 U.S. at 427 (citing *Gore*, 517 U.S. at 585).

122. According to the amicus brief filed by law and economics scholars, punitive damages calculations “should be based on (1) the probability that the wrongdoer might escape liability, and (2) the magnitude of the wrongdoer’s realized or expected gain. Punitive damages are especially important in cases of consumer fraud because of the high probability that most perpetrators of consumer fraud will escape liability entirely.” Brief for Amici Curiae Kenneth G. Dau-Schmidt et al. in Support of Respondents, 1995 WL 17008492, at \*2–3, *Gore* (No. 94-896).

123. Brief of Respondents, 2002 WL 31387421, at \*22–23, *Campbell* (No. 01-1289).

50,000 cases as a matter of statistical probability.”<sup>124</sup> Significantly, the U.S. Supreme Court characterized this statistic as bearing “no relation to the award’s reasonableness or proportionality to the harm,” rejecting the notion that economic efficiency should be considered in determining whether a punitive damages award violated due process.<sup>125</sup>

### III. ANALYSIS: MOVING TO AN ECONOMICALLY EFFICIENT APPROACH

This section addresses the flaws in the Supreme Court’s approach and proposes an alternative to the Supreme Court’s three-part test. The alternative approach suggested by this section is that the Supreme Court should move to an economic efficiency test, where total damages equal compensatory damages multiplied by the inverse of the enforcement rate. This section will conclude by advocating for an adjustment to the traditional definition of enforcement in order to give potential defendants the ability to avoid large punitive damages awards by self-regulating.

#### A. *The Supreme Court’s Decision Invites Appellate Review of Punitive Damages*

The Supreme Court’s due process analysis, far from a “mathematical formula,” invites appellate review of punitive damages on the grounds that a particular punitive damages award was unconstitutionally excessive.<sup>126</sup> Arguably, many punitive damages awards that represent less than a ten-to-one ratio between punitive and compensatory damages can be unconstitutional, which invites lawyers to argue on appeal that the jury award was unconstitutional.<sup>127</sup> From a policy perspective, this increase in appellate review is problematic. Appellate review is costly, both to litigants and society, because it depletes judicial resources and litigants must pay large attorney fees.<sup>128</sup> Less quantifiable costs of appellate review include a decrease in the

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124. *Campbell*, 538 U.S. at 426.

125. *Id.* at 427. The Court’s disregard for the fact that State Farm is rarely punished for its tortious conduct is quite significant from an economic perspective. This aspect of the Court’s decision will be explored in detail in Part IV. *See infra* notes 146–169 and accompanying text.

126. *See Campbell*, 538 U.S. at 424.

127. *See, e.g.*, *Bardis v. Oates*, 14 Cal. Rptr. 3d 89 (Ct. App. 2004); *Textron Fin. Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 13 Cal. Rptr. 3d 586 (Ct. App. 2004); *Blust v. Lamar Adver. Co.*, 813 N.E.2d 902 (Ohio Ct. App. 2004); *Williams v. Philip Morris Inc.*, 92 P.3d 126 (Or. Ct. App. 2004); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. Ct. 2004).

128. *See John J. Parker, Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 3 (1950).

confidence of trial judges and injustice for those litigants who cannot afford an appeal.<sup>129</sup>

### 1. *Flaws with the Reprehensibility Prong*

The first prong of the *Gore-Campbell* analysis measures the reprehensibility of the defendant's conduct. This part of the test is sensible. Punitive damages attempt to punish a defendant for egregious conduct.<sup>130</sup> The reprehensibility prong of the Supreme Court's approach looks to the nature of the harm, the defendant's recklessness in inflicting the harm, the financial vulnerability of the harmed individual, the number of harmful incidents, and the defendant's intentions.<sup>131</sup> All of these factors are indicative of a defendant's culpability, and should factor into reprehensibility, however, the Supreme Court has failed to recognize other indicia of reprehensibility.

One obvious consideration that the Supreme Court has neglected is the harmed individual's physical vulnerability. Why the Supreme Court has only considered the individual's financial vulnerability is unclear. Certainly, a defendant who withholds nourishment from a ninety-year-old nursing home resident with a debilitating disease is "more blameworthy" than a defendant who similarly neglects a resident capable of obtaining her own nourishment from the facility's cafeteria.<sup>132</sup> The Supreme Court should also consider the victim's physical vulnerabilities as indicative of the defendant's reprehensibility.

### 2. *Flaws with the Ratio Prong*

The second prong of the *Gore-Campbell* test sets a single digit ratio as a limit for a permissible punitive damages award.<sup>133</sup> The biggest flaw with this approach, which is discussed in detail below, is that it

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129. *Id.* at 14.

130. *See Day v. Woodworth*, 54 U.S. 363, 371 (1851) (stating that punitive damages should be awarded based on the "enormity" of the defendant's offense).

131. *See Campbell*, 538 U.S. at 419. The Court explained the reprehensibility prong, stating,

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id.* (citation omitted).

132. *See Gore*, 517 U.S. at 575. The reprehensibility prong "reflects the accepted view that some wrongs are more blameworthy than others." *Id.*

133. *Campbell*, 538 U.S. at 425 (stating that "[s]ingle-digit multipliers are more likely to comport with due process").



fails to account for enforcement error—the probability that the defendant will not be punished for the wrongful conduct.<sup>134</sup> The ratio prong is also flawed because of the Court's reluctance to impose a "mathematical formula" for computing punitive damages.<sup>135</sup>

The ratio prong's quasi-bright line limit provides very little help to lower courts trying to find the proper ratio between compensatory and punitive damages.<sup>136</sup> Out of a fear of arbitrariness, the Supreme Court has created a sliding scale ratio, whereby "small" compensatory damages may result in larger ratios and "substantial" compensatory damages may only result in smaller ratios.<sup>137</sup> The downside of such a flexible rule is that it increases appellate review of punitive damages awards, which increases societal costs.<sup>138</sup> Pro-plaintiff appellate courts may affirm higher ratios by characterizing compensatory damages as "small," and pro-defendant appellate courts may reverse higher ratios by characterizing compensatory damages as "substantial."<sup>139</sup> A more mathematical approach would lessen the burdens on appellate courts and litigants who must spend valuable time and resources reviewing the constitutionality of punitive damages awards.

### 3. *The Similar Civil Sanctions Prong*

In *Campbell*, the Court modified its analysis by emphasizing that comparisons between punitive damages and criminal sanctions are not as relevant as comparisons between punitive damages and other civil sanctions that could potentially be imposed.<sup>140</sup> The Court's hesitancy

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134. Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149 (1989).

135. See *Campbell*, 538 U.S. at 424.

136. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (upholding a 37.2-to-1 ratio between punitive and compensatory damages); *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 640 (10th Cir. 1996) (describing portions of the ratio discussion in *Gore* as "somewhat confusing"); *Stranahan v. Fred Meyer, Inc.*, 958 P.2d 854, 872 (Or. Ct. App. 1998), *rev'd on other grounds* by 11 P.3d 228 (Or. 2000) (commenting that a higher ratio may be used when "the monetary value of non-economic harm [is] difficult to determine" and finding that the economic value of infringement on a constitutional right is difficult to determine (alteration in original) (quoting *Gore*, 517 U.S. at 582)).

137. *Campbell*, 538 U.S. at 425. The Court made clear in *Campbell* that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

138. See *supra* notes 126–129 and accompanying text.

139. *Campbell*, 538 U.S. at 426.

140. *Id.* at 428. In diminishing the importance of applicable criminal sanctions, the Court explained:

The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties . . . .

to use the civil process to impose criminal penalties is legally sound, because the legal system has drawn an important dividing line between civil and criminal penalties.<sup>141</sup> For instance, criminal liability often results in jail time or probation, whereas civil liability is generally monetary in nature. Criminal procedures are also notably different from civil procedures.<sup>142</sup> For example, criminal proceedings require proof beyond a reasonable doubt, rather than the lower preponderance of the evidence standard applicable to many civil proceedings.<sup>143</sup> Thus, a comparison to similar civil fines is appropriate, whereas a comparison to similar criminal penalties is less relevant.

The similar civil sanctions prong has not affected the court's analysis in any significant sense. In both *Gore* and *Campbell* there was an enormous disparity between the punitive damages award and potential civil sanctions.<sup>144</sup> But if comparisons to similar civil sanctions become a more important part of the Court's future analysis, punitive damages will be significantly diminished, as civil sanctions are generally much lower than punitive damages awards.<sup>145</sup> For the defendant to have an incentive to challenge a punitive damages award, the award will almost certainly have to exceed the similar civil sanctions by a large margin. Therefore, if the similar civil sanctions prong begins to play more heavily into the Court's analysis, then punitive damages awards will be significantly diminished.

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*Id.*

141. See Ethan Venner Torrey, Comment, "*The Dignity of Crimes*": Judicial Removal of Aliens and the Civil-Criminal Distinction, 32 COLUM. J.L. & SOC. PROBS. 187, 191-92 (1999).

142. *Id.* One commentator describes the civil-criminal distinction as follows:

The law maintains a division between civil and criminal sanctions, as both procedural and substantive protections vary according to which type of sanction is involved. Definition as a criminal sanction triggers, among other things, constitutional prohibitions on ex post facto laws, double jeopardy, cruel and unusual punishment, and constitutional guarantees to a jury trial, to counsel, and to proof beyond a reasonable doubt.

*Id.* (citations omitted).

143. *Campbell*, 538 U.S. at 428.

144. Alabama's deceptive trade practices act provided a penalty of up to \$2000, a far cry from the \$2 million punitive damages award. *Gore*, 517 U.S. at 584. As the Court noted, "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud, an amount dwarfed by the \$145 million punitive damages award." *Campbell*, 538 U.S. at 428 (citations omitted).

145. See *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159 (10th Cir. 2000) (affirming a punitive damages award of over \$2 million, despite the fact that civil fines were a mere \$5000 per violation); *Axen v. Am. Home Prods. Corp. ex rel. Wyeth-Ayerst Labs.*, 974 P.2d 224 (Or. Ct. App. 1999) (noting the large disparity between legislatively imposed \$60,000 fines and the \$20 million punitive damages award).

*B. The Supreme Court's Approach Fails to Consider  
Economic Efficiency*

The biggest problem with the Supreme Court's approach is that it fails to take into account notions of economic efficiency. The economic efficiency of punitive damages has been a much-debated topic.<sup>146</sup> One goal of punitive damages is to deter future similar wrongful conduct,<sup>147</sup> by forcing the defendant to pay for the social costs that arose from the tortious act.<sup>148</sup> Judge Learned Hand's formula for assessing liability in tort cases reflects the deterrence objective, by making a defendant liable only when the burden of preventing the plaintiff's loss,  $b$ , is lower than the probability that the plaintiff will suffer the loss,  $p$ , multiplied by the loss suffered,  $L$ , or when  $b < pL$ .<sup>149</sup> The problem with this model is that it fails to account for the fact that a defendant is rarely held liable for one hundred percent of all wrongful conduct.<sup>150</sup> The probability that a defendant will not be held liable for one's wrongful conduct is known as enforcement error.<sup>151</sup> The burden on the defendant when the probability of liabil-

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146. For more general economic analyses of punitive damages, see Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415 (1989) (arguing that the defendant's wealth is irrelevant when determining punitive damages); Cooter, *supra* note 134 (examining the economic efficiency of punitive damages from a deterrence perspective); Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463 (1996) (arguing that the damage multiplier model for punitive damages must be altered when the victim is a customer of the defendant and consequently, the victim will have to pay for that multiplier through higher prices); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) (presenting empirical evidence of the correlation between compensatory and punitive damages and several factors that may affect whether punitive damages are awarded); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 954 (1998) (arguing that punitive damages should be imposed such that a defendant's payments will, "in an average sense, equal the harm" that the defendant has caused). Professors Polinsky and Shavell recognize that the probability that the defendant will not be punished (enforcement error) must be included to attain the proper amount of punitive damages. *Id.* at 887.

147. Cooter, *supra* note 134, at 1146 n.5 (citing KENNETH R. REDDEN, PUNITIVE DAMAGES 23-24 (1980); ROBERT E. SCHLOERB ET AL., PUNITIVE DAMAGES: A GUIDE TO THE INSURABILITY OF PUNITIVE DAMAGES IN THE UNITED STATES AND ITS TERRITORIES 13 (1988); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124 (1984); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2053 (1986)).

148. See Robert Ward Shaw, *Punitive Damages in Medical Malpractice: An Economic Evaluation*, 81 N.C. L. REV. 2371 (2003). The phrase "pay for" refers to internalization of costs. By forcing a defendant to pay for all the social costs attributable to the wrongful act, the defendant will have full incentive to "act to minimize all the costs to society." *Id.* at 2385.

149. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); Cooter, *supra* note 134, at 1151; Shaw, *supra* note 148, at 2382.

150. Cooter, *supra* note 134, at 1151; Shaw, *supra* note 148, at 2382.

151. Cooter, *supra* note 134, at 1149.

ity,  $q$ , is less than one is represented by the formula  $b = pLq$ .<sup>152</sup> To compensate for the lack of enforcement, a "damages multiple,"  $m$ , can be added to the equation, to make up for the fact that  $q$  is usually less than one.<sup>153</sup> In order to achieve Judge Hand's optimal level of deterrence,  $m$  must equal  $1/q$ .<sup>154</sup> By applying the damages multiple, the defendant is again required to pay for all the costs of the wrongful conduct, which should deter a rational person from future wrongful acts, satisfying the deterrence objective of punitive damages.<sup>155</sup> This "very basic"<sup>156</sup> model, like most economic models, makes many fundamental assumptions about human behavior.<sup>157</sup>

By way of illustration, suppose a nursing home employee negligently drops a resident, creating \$100,000 in actual damages, represented by  $L$  in the Hand formula. Assume the probability that the defendant's negligence only causes residents to fall in ten percent of all potential cases, representing  $p$ . However, the nursing home is only held liable for such negligent acts in fifty percent of similar cases, making  $q$  equal to one-half. The "damages multiple,"  $m$ , equals two, based on a  $q$  of one-half.<sup>158</sup> Under this model of punitive damages, the optimal liability, where the defendant pays for all costs placed on

152. *Id.* at 1151.

153. *Id.* Thus, without the damages multiple, the defendant's burden would equal  $pLq$ , and since  $q$  is less than one, the defendant's burden would be less than  $pL$ . *Id.* Adding a "damages multiple" compensates for a  $q < 1$ . *Id.*

154. *Id.* Remember,  $q$  is the probability that the defendant will be held liable and  $m = 1/q$ . Bringing  $m$  and  $q$  into the formula bring us back to Judge Hand's formula, where  $b = pLqm$ . Cooter, *supra* note 134, at 1151. If the defendant is only held liable ten percent of the time, a damages multiple of ten (i.e.,  $1/.10$ ) will compensate for the lack of enforcement in order to achieve the optimal level of deterrence, at  $pL$ . *Id.*

155. *Id.*

156. Shaw, *supra* note 148, at 2397 n.137 (stating that Professor Cooter's "model . . . seems to call for punitive damages to be a regular feature of liability, given that  $q$  is rarely one . . . . Of course, his model is very basic and does not include other countervailing considerations." (citation omitted)).

157. For a more complete model of punitive damages, see *id.* at 2380–95. Shaw expands on the damages multiple model of punitive damages by accounting for other externalities, such as litigation costs, "existence value," and deterrence value. *Id.* Taking these factors into account creates a much more complicated model of the damages multiple, where  $m = ([pL + (c_p + c_g) - D] + u(c_d)) / ([pL + (c_p + c_g) - D]q)$ . *Id.* at 2401. In this formulation,  $c_p$ ,  $c_d$ , and  $c_g$  are the litigation costs to plaintiff, defendant, and the rest of society respectively, and  $D$  is the social value of deterring wrongful conduct. *Id.* at 2387. The variable  $u$  represents "existence value," which reflects "both the egregious nature of the tort itself" and the undesirable expense of medical malpractice. *Id.* at 2393. For an analysis of punitive damages that considers more externalities, such as the defendant's wealth, actual and potential harm, disgorging the defendant of his or her gains, litigation costs, multiple lawsuits for similar wrongful conduct, public penalties, taxation, and insurance, see Polinsky & Shavell, *supra* note 146.

158. Recall that  $m = 1/q$ . See *supra* note 154 and accompanying text. In this example,  $q$  is .50, making  $m = 2$ .

society, will be  $mL$ , or \$200,000 in total damages.<sup>159</sup> Therefore, the defendant should pay the \$100,000 worth of actual damages and \$100,000 in punitive damages, in order to compensate for society's costs, which went uncompensated because of enforcement error. It should be emphasized that  $mL$  represents the total efficient recovery, not the total efficient punitive damages recovery, contrary to the Supreme Court's formulation.<sup>160</sup> Therefore, to determine the optimal punitive damages award, one must subtract the actual damages,  $L$ , from total optimal liability,  $mL$ , so that the optimal level of punitive damages is actually  $mL - L$ .<sup>161</sup>

The Supreme Court's *Gore* and *Campbell* decisions curiously rejected the idea that enforcement error should enter into the constitutional formula for computing punitive damages.<sup>162</sup> In *Gore*, an amicus brief filed by law and economics scholars advocated including enforcement error in the constitutional formula for determining the constitutionality of punitive damages.<sup>163</sup> The Court did not address those arguments in its opinion, and no part of the three-prong test considers economic efficiency or enforcement error in determining the constitutionality of a punitive damages award.

In *Campbell*, the economic efficiency argument was more pointedly rejected by the Court. The plaintiff argued that State Farm was only punished in one out of 50,000 cases, based on State Farm's own figures.<sup>164</sup> Although State Farm refuted that statistic,<sup>165</sup> the plaintiff argued that even if State Farm was only held accountable in one out of one hundred cases, an award of \$200 million would be justified on a

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159. See Shaw, *supra* note 148, at 2399. The optimal punitive damages award is  $mL$ . *Id.*

160. See Cooter, *supra* note 134, at 1191. Cooter provides an example similar to my own. *Id.* Suppose actual damages are \$1250, and the jury awards \$15,000 in punitive damages, which is reduced by the appellate court to \$5000. *Id.* "If the judge reasoned that the probability of" being held liable for the injury was 1/5, the appellate court's reduction was appropriate. *Id.* The reduction would create total liability of \$6250, or five times the actual damages, split among \$1250 in actual damages and \$5000 in punitive damages. *Id.*

161. The Supreme Court's formulation has the defendant paying both actual damages,  $L$ , and a punitive damages award that represents the actual damages multiplied by the punitive multiplier,  $mL$ . *Campbell*, 538 U.S. at 424-25; *Gore*, 517 U.S. at 582-83. When  $mL$  is the punitive damages award, as the Supreme Court suggests, then the plaintiff is double-dipping on actual damages by recovering actual damages in both the punitive damages award and the actual damages award. To sustain the optimal level of deterrence, the correct formula for punitive damages is  $mL - L$  and the formula for total damages is  $mL$ . Cooter, *supra* note 134.

162. *Campbell*, 538 U.S. at 426-27. The Court reasoned that the probability that State Farm would be punished had "no relation to the award's reasonableness or proportionality to the harm." *Id.* at 427.

163. Brief for Amici Curiae Kenneth G. Dau-Schmidt et al. in Support of Respondents at \*2-3, *Gore* (No. 94-896).

164. Brief of Respondents at \*23, *Campbell* (No. 01-1289).

165. Reply Brief, 2002 WL 31640699, at \*10, *Campbell* (No. 01-1289).

deterrence rationale, since compensatory damages were \$2 million.<sup>166</sup> The plaintiff was calculating the economically efficient total damages by multiplying compensatory damages by the inverse of the enforcement error, as explained above.<sup>167</sup> The Court avoided discussion of the economic efficiency argument altogether, reasoning that the lack of enforcement bore “no relation to the award’s reasonableness or proportionality to the harm.”<sup>168</sup> Without further analysis, the Court set aside all discussion of economic efficiency, instead opting for the “[s]ingle-digit multiplier[ ]” guideline, despite its many flaws.<sup>169</sup>

### C. *Creating an Incentive to Prevent Tortious Behavior with Punitive Damages*

Economically efficient punitive damages awards give the tortfeasor an incentive to avoid tortious behavior by making the tortfeasor pay for the costs inflicted on society.<sup>170</sup> In order to force a defendant to fully pay for its tortious conduct, the defendant must provide full compensation to all victims, which includes payment for tortious acts that were not enforced through a civil lawsuit.<sup>171</sup> Otherwise, a jury award will under-deter tortious behavior.<sup>172</sup> Under the Supreme Court’s analysis, where punitive damages are wholly divorced from enforcement error, potential defendants have little incentive to take corrective action to enforce and prevent elder abuse. Rather, a defendant’s economic incentive is to cover up the tortious act or downplay its significance to reduce liability exposure. By not taking genuine action to prevent future tortious acts or compensate victims, potential defendants keep the enforcement low and perpetuate their abusive tendencies. The key to preventing tortious conduct in the long run is to provide financial incentives to self-regulate, by tying liability to enforcement error.<sup>173</sup> If a tortfeasor’s potential liability decreases when it has a high enforcement rate, the tortfeasor will attempt to increase

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166. Brief of Respondents at \*23, *Campbell* (No. 01-1289).

167. *Id.* The plaintiff assumed that there was a one percent chance that State Farm would be punished for its fraudulent conduct. *Id.* at \*24–25. Thus, the proper damages multiple would be 1/.01 or 100. *Id.* at \*25. With compensatory damages of \$2 million, the plaintiff figured a \$200 million award was justified as economically efficient deterrence. *Id.*

168. *Campbell*, 538 U.S. at 426–27.

169. *Id.* at 425.

170. Shaw, *supra* note 148, at 2385.

171. Polinsky & Shavell, *supra* note 146, at 887. “[I]f a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability.” *Id.*

172. *Id.*

173. *Id.* at 888. “If damages merely equal harm, injurers’ incentives to take precautions will be inadequate and their incentive to participate in risky activities will be excessive.” *Id.*

its enforcement rate, if possible.<sup>174</sup> Thus, a very straightforward, bright-line test for determining total liability should be to simply multiply compensatory damages by the inverse of the enforcement rate.<sup>175</sup> Total liability minus the amount of compensatory damages would then equal the amount of punitive damages.<sup>176</sup> Consequently, tortfeasors with high enforcement rates will have smaller legal judgments. On the other hand, tortfeasors with low enforcement rates will continue to pay larger legal judgments.

#### D. A Somewhat Expanded Definition of Enforcement

One critical term remains undefined. What exactly does enforcement mean?<sup>177</sup> Traditionally, enforcement required that a tortfeasor was forced to pay damages to the plaintiff through a lawsuit.<sup>178</sup> The definition this author proposes expands on the traditional definition of enforcement by allowing the tortfeasor to self-regulate. A tortfeasor should be able to enforce a tortious act by taking steps outside of the litigation process. Some possible ways to enforce an incident of tortious behavior through self-regulation would be to (1) provide meaningful compensation to victims; (2) implement improved procedures to prevent tortious acts; and (3) punish or terminate the employees committing the tort. If a tortfeasor has the proper incentives to prevent elder abuse and punish offenders, the tortfeasor will take whatever steps feasible to do so. Providing economic incentives for self-regulation will keep potential litigants out of court by decreasing the number of tortious acts, which in turn will lessen the burdensome costs of litigation. Conversely, if a tortfeasor does not self-regulate, enforcement rates will remain low, and when a lawsuit is filed, the tortfeasor will face large punitive damages awards and litigation fees.

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174. See *supra* note 148.

175. This total damages multiplier has been urged by many other commentators. See generally, e.g., Cooter, *supra* note 134; Polinsky & Shavell, *supra* note 146; Shaw, *supra* note 148.

176. Polinsky & Shavell, *supra* note 146, at 890. "We will refer to the excess of total damages over compensatory damages as *punitive damages*." *Id.*

177. A general definition of enforcement is "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement." BLACK'S LAW DICTIONARY 569 (8th ed. 2004).

178. The definition of enforcement error as the probability that a tortious defendant will be held liable is assumed in virtually all works that discuss punitive damages. See, e.g., David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 377 (1998) (arguing that enforcement error is common because many potential plaintiffs are reluctant to "file[ ] suit"); Polinsky & Shavell, *supra* note 146, at 888 (defining enforcement error as the defendant's ability to "escape liability"); Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. CHI. L. SCH. ROUNDTABLE 75, 101 (2002) (describing enforcement error as the probability that a defendant will be "found liable less than all of the time").

The tortfeasor will be forced to pay for all similar unenforced tortious acts through the economically efficient damages multiple.

#### IV. IMPACT: THE SUPREME COURT'S APPROACH WILL DISPROPORTIONATELY IMPACT NURSING HOME ABUSE

The Supreme Court's approach to limiting punitive damages awards will have perhaps the largest impact on nursing home abuse and neglect cases. As this section demonstrates, those cases often involve a small amount of compensatory damages and large punitive damages awards, due to several factors. Because punitive damages are crucial in cases of nursing home abuse and neglect, this section proposes a new approach to dealing with nursing home abuse and neglect, one that accounts for enforcement error and expands the definition of enforcement to promote self-regulation.

##### *A. Punitive Damages Play a Particularly Important Role in Nursing Home Abuse Cases*

The Supreme Court's decision to place constitutional limitations on punitive damages will likely have the largest impact on nursing home abuse and neglect cases. As demonstrated by many of the cases mentioned above, elder abuse lawsuits against nursing homes often involve punitive damages awards that push the constitutional envelope.<sup>179</sup> In addition, punitive damages are four times more likely in nursing home abuse cases, as compared to other personal injury cases.<sup>180</sup> Why do juries tend to award large punitive damages to plaintiffs in nursing home abuse cases? One of the most significant reasons is that compensatory damages in nursing home abuse cases are often small, so a large ratio between compensatory and punitive damages compensates for the lack of compensatory damages.

Compensatory damages in nursing home abuse cases are often smaller than in other personal injury cases because the plaintiff is usually an unemployed or retired senior citizen.<sup>181</sup> Therefore, the plaintiff's injury will not cause a loss in past or future earnings.<sup>182</sup> Furthermore, an elderly plaintiff's life expectancy will be significantly

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179. See *supra* notes 15–19, 64–90 and accompanying text.

180. Harris, *supra* note 30, at 15 (reporting that “approximately twenty percent of all cases against nursing homes result in punitive damages, compared with five percent in other types of personal injury cases”).

181. See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 148 (1998).

182. *Id.* See also Julie A. Braun & Cheryl C. Mitchell, *Recent Developments in Seniors' Law*, 34 TORT & INS. L.J. 669, 687 (1999); Scott, *supra* note 22, at 119.



shorter, making "loss of enjoyment and consortium" claims less valuable.<sup>183</sup> In addition, the smaller compensatory damages awards can be partially explained by the increased likelihood that nursing home residents will have mental and physical conditions prior to the defendant's tortious act.<sup>184</sup> The nursing home resident's preexisting condition, and susceptibility to falls, fractures, diseases, and other impairments make it difficult for the fact finder to separate the problems caused by the defendant from those that already existed, especially when the defendant attributes the harmful result to the "normal aging process."<sup>185</sup>

One commentator has argued that "[o]ften little or no social value is ascribed to older people," increasing the chance of a diminished jury verdict.<sup>186</sup> Another problem with litigating nursing home abuse is that personal injury attorneys may perceive elder abuse cases as less valuable in terms of compensatory damages and, therefore, may not take on the case.<sup>187</sup> But when punitive damages are involved, elder abuse cases can actually be quite valuable.<sup>188</sup> There are other logistical difficulties in elder abuse cases; there is an increased probability that the resident will die prior to trial and older persons often make poor witnesses because of "decreased mental capacity, speech and hearing problems, and memory loss."<sup>189</sup> Diminished jury verdicts will decrease the economic incentive for nursing homes to avoid elder abuse and neglect, assuming that the current verdicts are less than economically efficient.<sup>190</sup>

### *B. A Glimmer of Hope for an Exception to the Single Digit Ratio in Nursing Home Abuse Cases?*

Some language in *Gore* and *Campbell* may provide a chance for litigants to carve out an exception to the single digit ratio prong in nursing home abuse cases. In *Gore*, the Court stated that

low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a par-

183. Moskowitz, *supra* note 181, at 148.

184. Scott, *supra* note 22, at 119.

185. Moskowitz, *supra* note 181, at 148.

186. *Id.* at 149.

187. See George Clyde Gray, *Protecting the Vulnerable, Nursing Home Falls: Not Your Average Slip-and-Fall Case*, TRIAL, July 2000, at 91. "When evaluating any new case, lawyers must be mindful of the potential for recovery. Does the advanced age and poor health of the resident limit that potential?" *Id.* at 92.

188. See *supra* notes 15-19, 64-90 and accompanying text.

189. Scott, *supra* note 22, at 119.

190. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 192, 192 (Peter Newman ed., 1997).

ticularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.<sup>191</sup>

In *Campbell*, the Court reaffirmed these principles.<sup>192</sup> As noted above, nursing home abuse and neglect cases often result in relatively small amounts of compensatory damages.<sup>193</sup> In addition, nursing home abuse can be difficult to detect because very few perpetrators are caught and punished.<sup>194</sup> The monetary value of the non-economic harm is also difficult to determine in nursing home abuse cases. Elderly residents often have preexisting conditions, making it difficult to determine what costs are associated with the damage inflicted by the nursing home staff.<sup>195</sup> Nursing home abuse cases as a class carry many of the characteristics that the Supreme Court has listed as possible justifications for exceeding the ten-to-one ratio between compensatory and punitive damages.<sup>196</sup> Therefore, plaintiffs in nursing home abuse cases can make a strong argument that the single digit limit set by *Campbell* does not apply to their case.<sup>197</sup> If the single digit limit is inapplicable, courts will have to come up with a new approach in nursing home abuse cases.

### C. *A Proposal for a New Approach in Nursing Home Abuse and Neglect Cases*

A framework where nursing homes are rewarded for properly “enforcing” elder abuse and neglect should decrease the number of instances of elder abuse. Therefore, the framework this author proposes aims to provide nursing homes with a financial incentive to genuinely take steps to prevent elder abuse, punish offending employees, and compensate victims for losses. In order to create that incentive and deter elder abuse and neglect, economically efficient punitive damages are a necessary threat.<sup>198</sup> But when punitive damages are excessive, nursing homes pay for more damage than they cause, which unnecessarily decreases a nursing home’s profitability.<sup>199</sup>

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191. *Gore*, 517 U.S. at 582.

192. *Campbell*, 538 U.S. at 425 (citing *Gore*, 517 U.S. at 582).

193. See *supra* notes 179–190 and accompanying text.

194. See *supra* notes 54–63 and accompanying text.

195. Moskowitz, *supra* note 181, at 148.

196. *Campbell*, 538 U.S. at 425; *Gore*, 517 U.S. at 582.

197. *Campbell*, 538 U.S. at 425.

198. Polinsky & Shavell, *supra* note 190, at 192. “[T]he proper magnitude of damages is the harm that the party has caused” in order to achieve the goal of deterrence. *Id.*

199. *Id.* at 193. “If damages exceed harm, parties will have a more-than-adequate incentive to meet the [negligence] standard . . . .” *Id.* See also Shanahan, *supra* note 14, at 384 (stating that

As detailed above, punitive damages play a significant role in elder abuse cases and can often push the limits of constitutionality for several reasons.<sup>200</sup> Assuming large jury verdicts do actually deter tortious conduct,<sup>201</sup> constitutional limitations on punitive damages that fall below the economically efficient level will increase the amount of elder abuse that occurs in America's nursing homes.<sup>202</sup> When the elderly population increases, as predicted, more senior citizens will be subject to abuse or neglect in nursing homes.<sup>203</sup> The Supreme Court's current approach should help alleviate the financial problems of the nursing home industry by limiting the amount of punitive damages and consequently, lowering liability insurance.<sup>204</sup> Nevertheless, the question remains: Can nursing homes remain profitable, while at the same time protecting residents from abuse and neglect?

In order to "enforce" an instance of elder abuse and neglect, the nursing home must first accomplish the sometimes daunting task of determining that an incident of abuse or neglect did in fact occur.

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"runaway damage awards in some states like Florida and Texas are raising the costs for nursing homes nationwide, who must necessarily pass some of the costs on to the patients").

200. See *supra* notes 64-90 and accompanying text.

201. Critics of the deterrent value of tort law abound. See, e.g., Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); Izhak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 33, 56 (1980); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998). Still, many influential commentators readily accept the assumption that tort law does deter. See generally, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (advocating for a tort system that requires tortfeasors to pay for all the costs of the accidents they cause, which relies on the assumption that tort law deters); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 191 (4th ed. 1992) (stating that compensatory damages must be paid to the victim to provide "an incentive to sue, which is essential to the maintenance of the tort system as an effective, credible deterrent to negligence"); SPECIAL COMM. ON THE TORT LIAB. SYS., AM. BAR ASS'N, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (1984) (praising the overall social value of tort law). For an in-depth discussion of whether tort law deters, see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994), and sources cited therein.

202. Polinsky & Shavell, *supra* note 190, at 192. "If damages equal harm, parties will have socially correct incentives to take precautions. . . . If, however, damages are less than harm, precautions will tend to be inadequate . . . ." *Id.*

203. See *supra* notes 32-34 and accompanying text.

204. See Polinsky & Shavell, *supra* note 146, at 931-32 n.193 (discussing the various jurisdictional approaches to the insurability of punitive damages). Most jurisdictions allow insurance against punitive damages, at least when the conduct was unintentional. *Id.* Even those jurisdictions that generally do not allow insurance of punitive damages allow for insurance of punitive damages for vicarious liability. *Id.* In the nursing home context, nearly all cases of abuse are either unintentional or performed by an employee of the defendant, or both. If an employee performs the wrongful act, the nursing home will be vicariously liable. Thus, punitive damages against nursing homes will generally be insurable. Large punitive damages will increase the cost of liability insurance for the nursing home.

Once the instance of abuse or neglect has been detected, what steps must the nursing home take to “enforce” a solution? Is a simple reprimand of the abusive employee enough? Does a systemwide improvement of the facility’s policies and procedures on preventing abuse constitute “enforcement”? How much does the nursing home have to pay in damages to the abused individual for each instance of abuse in order to effectively “enforce” elder abuse standards? Traditionally, enforcement has been defined as the recovery by the victim of damages in a private lawsuit,<sup>205</sup> which makes it impossible for the nursing home to self-regulate as enforcement requires the victim to act.

The goal of “enforcing” elder abuse and neglect should be to create an incentive for nursing homes to detect and punish elder abuse to diminish the number of instances of nursing home abuse. Therefore, it seems unwise to place the ball in the potential plaintiff’s court, by defining enforcement as a private lawsuit. A better approach is to allow the nursing home to decrease liability if the nursing home is successful at self-regulation. There must be a clear definition of enforcement that allows for self-regulation to prevent abuse, enhance detection of abuse, and alleviate the harmful effects of abuse. Commentators have proposed several policies, such as mandatory criminal background checks for caretakers,<sup>206</sup> better reporting procedures,<sup>207</sup> increased law enforcement oversight and prosecutions,<sup>208</sup> increased enforcement of improved legal standards of care,<sup>209</sup> and harsher civil or criminal penalties.<sup>210</sup> Implementing only one of these policies is probably insufficient to satisfy the enforcement requirement.<sup>211</sup>

This author proposes that a nursing home could satisfy the “enforcement” definition by taking several corrective measures. For example, by implementing detection procedures, and providing monetary damages to the victim, the nursing home should satisfy the enforcement requirement. Enforcement must be defined by each ju-

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205. See *supra* note 178 and accompanying text.

206. See generally Marciano, *supra* note 1.

207. See generally Marshall B. Kapp, *Resident Safety and Medical Errors in Nursing Homes: Reporting and Disclosure in a Culture of Mutual Distrust*, 24 J. LEGAL MED. 51 (2003).

208. See generally Marie-Therese Connolly, *Federal Law Enforcement in Long Term Care*, 4 J. HEALTH CARE L. & POL’Y 230 (2001).

209. See generally Kevin B. Dreher, Note, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go from Here?*, 10 ELDER L.J. 119 (2002).

210. See generally Moskowitz, *supra* note 181; Angela Snellenberger Quin, Comment, *Imposing Federal Criminal Liability on Nursing Homes: A Way of Deterring Inadequate Health Care and Improving the Quality of Care Delivered?*, 43 ST. LOUIS U. L.J. 653 (1999).

211. See Connolly, *supra* note 208, at 292 (arguing for an “ambitious, . . . comprehensive, and well-funded national plan”).

risdiction to require nursing homes to genuinely punish offending employees and provide victims with adequate compensation. One difficulty with defining enforcement is calculating the amount of compensation that a nursing home must provide to a resident, in order to "enforce" the instance of abuse. A traditional contract remedy, restitution damages, is a good starting point.<sup>212</sup> Nursing homes that reimburse the resident for any medical costs arising from the abuse or neglect and the annual price of staying at a facility should provide enough monetary compensation to satisfy the damages aspect of enforcement.<sup>213</sup> Thus, a state may define enforcement as (1) implementing certain specified procedures for detecting abuse, (2) providing restitution damages to abused individuals, and (3) taking disciplinary action against the offending employee. If a nursing home takes these actions to prevent elder abuse in five percent of all cases of elder abuse, the nursing home will be subject to a damages multiple of twenty.<sup>214</sup> On the other hand, a nursing home that takes these actions in one hundred percent of cases will never be subject to punitive damages.<sup>215</sup> Each jurisdiction should provide a nursing home with concrete guidance on how to comply with the enforcement requirement so the nursing home can prevent future punitive damages awards that reflect a poor enforcement rate.

When a nursing home is not diligent in "enforcing" elder abuse, a private action may be brought by a resident. In such cases, the nursing home will be forced to pay a rather large punitive damages award, which reflects the damages inflicted on the individual plaintiff and all other abusive incidents that went unenforced.<sup>216</sup> In fact, when a resident brings a private lawsuit against a nursing home that has done a

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212. Restitution is defined as "compensation for loss." BLACK'S LAW DICTIONARY 1339 (8th ed. 2004).

213. "[W]here the plaintiff is out of pocket more than the defendant has gained and the defendant's conduct is tortious, the plaintiff will recover his loss in a quasi-contractual or equitable action for restitution. Unjust impoverishment as well as unjust enrichment is a ground for restitution." *Id.* at 1340 (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-23, at 376 (3d ed. 1987)) (internal quotation marks omitted). Thus, restitution can constitute payment for the defendant's unjust enrichment and the plaintiff's unjust impoverishment. Under the proposed approach to satisfying the definition of enforcement, the nursing home would have to provide damages for both unjust enrichment and unjust impoverishment. The nursing home would provide unjust enrichment compensation by paying the plaintiff's costs of stay at the nursing home. The nursing home would provide unjust impoverishment compensation by paying the plaintiff's medical costs.

214. The damages multiple is the inverse of the enforcement rate. *See supra* notes 146-161 and accompanying text. Therefore, the damages multiple in this case would equal 20 ( $1/.05 = 20$ ).

215. If the enforcement rate is 100%, then the damages multiple is 1 ( $1/1 = 1$ ).

216. *See supra* notes 146-161 and accompanying text.

very poor job "enforcing" elder abuse, the damages multiple may exceed the current constitutional parameter of a single digit ratio between punitive and compensatory damages.<sup>217</sup> Yet, the amount of total damages will be economically efficient, representing compensatory damages multiplied by the inverse of the enforcement rate.<sup>218</sup>

#### *D. Practical Problem: Finding Statistics on Enforcement Rates*

Currently, there are very few statistics on enforcement rates in nursing home abuse cases, but the statistics that are available suggest that the enforcement rate is low.<sup>219</sup> Tying total liability to enforcement error would make a particular nursing home's record of reporting and rectifying elder abuse a fundamental aspect of the civil trial. Plaintiffs' attorneys would gather statistics on how poorly nursing homes "enforce" instances of elder abuse and defense attorneys would gather information on the nursing home's effectiveness in "enforcing" elder abuse. Presumably, more complete statistics on enforcement would be available because of enforcement's important role in determining liability. But the final determination of a nursing home's enforcement rate would be a question for the jury to decide. As the finder of fact, the jury would be required to determine both the enforcement rate and compensatory damages. The defendant's total liability, as assessed by the jury, would equal the amount of compensatory damages multiplied by the inverse of the enforcement rate.

### V. CONCLUSION

Due to the pervasiveness of elder abuse in America, it is vitally important that the problem be dealt with in a way that deters nursing homes from allowing elder abuse to occur.<sup>220</sup> The aging of America will only magnify the problem of elder abuse in years to come.<sup>221</sup> Many of these elderly individuals will be placed in nursing homes that are unable to provide adequate care because of financial instability

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217. Under the proposed approach, if a nursing home has rarely satisfied the jurisdictional definition of enforcement, the damages multiple may be well over the Supreme Court's constitutional limits. On the other hand, a nursing home that has been diligent in "enforcing" elder abuse will have a damages multiple well within the current constitutional limits. For example, a nursing home that has satisfied the definition of enforcement in 95 out of 100 cases of elder abuse will have a damages multiple of 1.052 ( $1/.95 = 1.052$ ). Nursing homes that have satisfied the enforcement definition will have diminished liability in the presumably rare case that a resident brings a private action.

218. See *supra* notes 146-161 and accompanying text.

219. See *supra* notes 56-63 and accompanying text.

220. See *supra* notes 54-63 and accompanying text.

221. See *supra* notes 32-34 and accompanying text.

brought on by costly litigation and punitive damages awards.<sup>222</sup> In the past decade, the Supreme Court began a path toward limiting the amount of punitive damages available to plaintiffs under the Due Process Clause of the Fourteenth Amendment.<sup>223</sup> The Supreme Court's approach neglects to account for economic efficiency, specifically, the role of enforcement error.<sup>224</sup> This approach will likely have the largest impact on nursing home abuse and neglect cases.<sup>225</sup> By limiting punitive damages, the Supreme Court has lessened the deterrent effect of punitive damages in those instances where nursing homes have done a poor job detecting and punishing resident abuse.<sup>226</sup> Consequently, this author proposes a new approach to punitive damages, which uses economically efficient punitive damages to encourage nursing homes to self-regulate by "enforcing" elder abuse.<sup>227</sup>

The Supreme Court's analysis for assessing punitive damages under the *Gore-Campbell* line of cases is flawed, at least from a policy standpoint.<sup>228</sup> Economically efficient punitive damages serve an important goal—to deter wrongdoers from tortious conduct.<sup>229</sup> The Supreme Court's analysis neglects to account for economic efficiency when reviewing punitive damages awards by failing to incorporate enforcement error into the constitutional equation.<sup>230</sup>

In the nursing home abuse context, nursing homes are not forced to pay for the costs they inflict on society because nursing homes, and society generally, are inefficient in punishing such wrongful conduct.<sup>231</sup> If lack of enforcement is brought into the constitutional equa-

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222. See *supra* notes 35–53 and accompanying text.

223. See *supra* notes 91–121 and accompanying text.

224. See *supra* notes 146–169 and accompanying text.

225. See *supra* notes 179–190 and accompanying text.

226. See *supra* notes 201–203 and accompanying text.

227. See *supra* notes 198–218 and accompanying text.

228. This Comment does not attempt to critique the Supreme Court's standard from a historical or textual view of the Constitution. Rather, the sole purpose of this Comment is to critique the Supreme Court's analysis from a policy perspective. Whether enforcement rates and damages multipliers are represented in the text of the Constitution is another debate entirely. For example, Justice Scalia's *Gore* dissent argued that the Constitution does not place substantive limits on state jury awards and that the majority's opinion was an "unjustified incursion into the province of state governments." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).

229. See *supra* note 147 and accompanying text.

230. *Campbell*, 538 U.S. 408. The Court stated that the low statistical probability that State Farm would be held liable for their wrongful conduct bore no relationship to the reasonableness of the punitive damages award. *Id.* at 427.

231. Currently, there are few very reliable statistics on the lack of enforcement of elder abuse, however, from the statistics that are available, it is clear that elder abuse is very difficult to detect and remedies are usually unavailable or insufficient. See *supra* notes 54–63 and accompanying text.

tion, in the long run it will be economically beneficial for nursing homes to increase enforcement through self-regulation.<sup>232</sup> Because total liability is tied to a lack of enforcement, as enforcement increases, total liability decreases.<sup>233</sup> Enforcement should be defined by state law to require implementation of detection procedures, genuine punishment of offending employees, and payment of restitution damages. When a private lawsuit is brought against a nursing home, the nursing home should be required to pay for all the unenforced instances of elder abuse and neglect, with total damages that equal compensatory damages multiplied by the inverse of the enforcement rate.<sup>234</sup> When liability is tied to the enforcement rate, the nursing home will have an incentive to detect and “enforce” elder abuse because the damages multiple will shrink in any subsequent private lawsuit. This will decrease a nursing home’s exposure to liability and also decrease the number of lawsuits that are filed, which will decrease the nursing home’s overall costs.<sup>235</sup>

A nursing home that increases its enforcement rate will decrease liability. This may be a way out of the potential vicious cycle—where the nursing home is subject to increased punitive liability, thus creating diminished resources, which then creates an environment of abuse and neglect, and further subjects the nursing home to more liability.<sup>236</sup> If a nursing home has the proper incentives to prevent abuse and neglect and compensate residents, total liability will decrease and the private nursing home will become more economically viable. In an aging America, the economic stability of nursing homes and the ability for those homes to provide adequate care are crucial to ensure that all of us will be cared for in our old age.

*Richard H. Tilghman IV\**

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232. See *supra* notes 170–178 and accompanying text.

233. This is because the damages multiple is the inverse of the enforcement rate. See *supra* notes 152–154 and accompanying text. Thus, as  $q$  increases,  $1/q$  (enforcement error),  $m$  ( $m$  is  $1/q$  by definition), will decrease and totally liability will decrease. See *supra* notes 152–154 and accompanying text.

234. See *supra* notes 198–204 and accompanying text.

235. This also assumes that there is accurate, up-to-date information available on the amount of nursing home abuse cases that are punished. However, as mentioned above, by tying liability to a lack of enforcement, it will be in the nursing home’s best interest to gain accurate statistics on increasing enforcement rates. Similarly, the plaintiff’s bar will want to maintain statistics on the lack of enforcement. Although the statistics are likely to be somewhat skewed in favor of enforcement on the nursing home side while showing a lack of enforcement on the plaintiff’s side, there will at least be better information upon which to base punitive liability.

236. See *supra* note 21 and accompanying text.

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